Supreme Court, U.S.
FILED
JAN 5 2000
CLERK

(3)

No. 99-954

IN THE
Supreme Court of the United States

WALTER GEORGE,
Petitioner,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
LOCAL BRANCH #1037,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS

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14pp

QUESTIONS PRESENTED

1. Whether the courts below properly concluded that a local union's proposal to engage in a letter-writing campaign (which was never implemented) did not constitute "coercion" within the narrow meaning of Section 8(b)(4) of the Labor Management Relations Act?

2. Whether the courts below correctly rejected Petitioner's tortious interference claim under Texas state law when Petitioner conceded that if the local union's letter-writing campaign fell outside the scope of Section 8(b)(4), that campaign would also enjoy a defense under Texas law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	3
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

BE&K Construction Co. v. *United Brotherhood of Carpenters*, 90 F.3d 1318 (8th Cir. 1996) 9

Brown & Root, Inc. v. *Louisiana State AFL-CIO*, 10 F.3d 316 (5th Cir. 1994) 9

Delta Air Lines, 293 N.L.R.B. 602 (1989) 5

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Construction Trade Council*, 485 U.S. 568 (1988) ..... *passim*

Gottfried v. *Sheet Metal Workers' Int'l Ass'n, Local Union No. 80*, 876 F.2d 1245 (6th Cir. 1989) 8, 9

International Union of Operating Engineers, Local 150 v. *NLRB*, 47 F.3d 218 (7th Cir. 1995) 8

Limbach Co. v. *Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241 (3d Cir. 1991) 8

Local 20, Teamsters, Chauffeurs and Helpers Union v. *Morton*, 377 U.S. 252 (1964) 9

Local Union No. 25 v. *NLRB*, 831 F.2d 1149 (1st Cir. 1987) 8

Local Union No. 48 of Sheet Metal Workers International Ass'n v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964) 9

Monarch Long Beach Corp. v. *Soft Drink Workers, Local 812*, 762 F.2d 228 (2d Cir. 1985) 9

NLRB v. *Fruit Packers*, 377 U.S. 58 (1964) ..... *passim*

NLRB v. *IBEW*, 405 F.2d 159 (9th Cir. 1968) 8

NLRB v. *Retail Store Employees*, 447 U.S. 607 (1980) ..... *passim*

Pet. Inc., 288 N.L.R.B. 1190 (1988) 5

Pye v. *Teamsters Local Union No. 122*, 61 F.3d 1013 (1st Cir. 1995) 8, 9

Ramada, 302 N.L.R.B. 919 (1991) 5

Sheet Metal Workers, Local Union No. 91 v. *NLRB*, 905 F.2d 417 (D.C. Cir. 1990) 8

United Mine Workers of America v. *Gibbs*, 383 U.S. 715 (1966) 9

Statutes

29 U.S.C. § 158(b)(4) ..... *passim*

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BRIEF IN OPPOSITION OF RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS

Respondent the National Association of Letter Carriers ("the NALC") submits this brief in opposition to the petition for writ of certiorari ("Pet.") filed by Walter George ("George").

STATEMENT OF THE CASE

In mid-1996, a local union affiliated with the NALC, Branch 1037 (the "Branch"), passed a motion at a membership meeting to write to letter carriers in Midland, Texas—the area where George sold uniforms for Brookfield Uniform Supply Company ("Brookfield"), a supplier of postal uniforms. App. 2-3. By undertaking such a

letter-writing campaign, the Branch would inform the carriers in Midland of George's contemporaneous employment as a consultant to the United States Postal Service ("Postal Service"), during the course of which George criticized the letter carriers represented by the Branch in Amarillo, Texas as exhibiting "sloppiness" and "sloth." App. 2-3. In the Branch's view, it was inconsistent of George to derive income from letter carriers as a Brookfield salesperson while also criticizing letter carriers as a consultant for the Postal Service, and the Branch intended to ask the letter carriers in Midland to not purchase uniforms from George. App. 2-3.

When George's superior at Brookfield, Phil Hampton, learned of the intended letter-writing campaign, he terminated George. App. 3-4. As a result, the Branch never began the proposed letter-writing campaign. R. 457.

In his statement of facts, George commits three fundamental errors.

First, George mischaracterizes the conduct taken by the Branch. The Branch did not, as George contends, "formally vote[] to boycott Brookfield." Pet. 3. Instead, as the Fifth Circuit noted, the undisputed record evidence is that the Branch adopted a motion at its June 1996 membership meeting that the Branch write to the letter carriers in Midland, Texas—the area where George sold uniforms for Brookfield—to inform them of George's conduct as a consultant in Amarillo and to ask the letter carriers not to purchase uniforms from *him*. App. 3; R. 433, 453-57. At no point did the Branch intend to call for a general boycott of Brookfield itself. Indeed, the undisputed record evidence is that the letter carriers in Amarillo intended to continue purchasing from Brookfield. R. 587.

Second, George fails to properly set forth the undisputed record evidence of the reason why the letter carriers

proposed such a letter-writing campaign. Specifically, George ignores the fact that the letter carriers thought it was inconsistent of George to derive income from letter carriers as a Brookfield salesperson in Midland while also criticizing letter carriers as a consultant for the Postal Service in Amarillo. R. 441, 444, 759. It was this inconsistency that led the letter carriers to propose their letter-writing campaign. App. 2-3.

Finally, in an attempt to minimize his own role in his termination, George fails to acknowledge that when Phil Hampton, the Brookfield district area manager for Texas, first contacted him in mid-April, Hampton asked him to agree to cease working as a consultant for the Postal Service, thereby avoiding any inconsistency with his work for Brookfield. R. 360, 379-84, 407-09. George refused to make any such promise. R. 380-82.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The writ should be denied because the decision below is clearly consistent with the Court's decisions in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trade Council*, 485 U.S. 568 (1988); *NLRB* v. *Fruit Packers*, 377 U.S. 58 (1964) ("*Tree Fruits*"); and *NLRB* v. *Retail Store Employees*, 447 U.S. 607 (1980) ("*Safeco*"). The Fifth Circuit's decision is equally consistent with the decisions of other courts of appeals. Contrary to George's assertion, there is no conflict among the circuit courts which needs resolution.

1. The Fifth Circuit's basic holding—that the Branch's proposed letter-writing campaign did not constitute "coercion" within the narrow meaning of Section 8(b)(4)—is consistent with the Court's decisions, particularly *DeBartolo*. There, a union organized a consumer boycott against all 86 stores in a shopping mall in order to pres-

sure the mall owner to influence *one* of the stores in the mall not to use a non-union construction company which paid substandard wages. In response, the mall owner brought a Section 8(b)(4) claim against the union, stressing that neither the mall owner nor any of the other tenants had any contractual right to influence the one store's selection of contractors. *Id.* at 570.

In rejecting the mall owner's claim that the boycott was "coercive," the Court adopted the well-settled rule of statutory construction that courts should avoid interpreting statutes as requiring an unconstitutional result. *Id.* at 575. Given that citizens have a right under the First Amendment of the U.S. Constitution to publicize disputes, the Court refused to interpret Section 8(b)(4)'s prohibition on "coercion" as somehow taking away this right. The Court reasoned that a citizen cannot lose this right simply because he or she belongs to a union, because the dispute is a labor dispute, or because he or she publicizes the dispute during a union meeting. *Id.* at 576, 583.

The Court concluded that a secondary employer cannot demonstrate "coercion" within the meaning of Section 8(b)(4) merely by showing that a union's boycott "inflict[s] economic harm on the secondary employer[] by causing [it] to lose business." *Id.* at 579. While such a showing might establish "coercion" as one generally understands that term, the Court emphasized that as long as the infliction of harm upon a neutral employer is the result of verbal requests rather than picketing, there can be no "coercion" within the meaning of Section 8(b)(4) for any other result would infringe upon First Amendment rights. *Id.* at 578-80.[1]

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[1] The Court similarly explained that its decision in *DeBartolo* was consistent with two earlier cases on Section 8(b)(4), *Tree*

As the Fifth Circuit recognized, since *DeBartolo*, the National Labor Relations Board has routinely rejected Section 8(b)(4) claims identical to that raised by George and has allowed unions to publicize total consumer boycotts of secondary employers as long as the unions refrain from picketing. *See* App. 22-24 (citing *Ramada*, 302 N.L.R.B. 919 (1991); *Delta Air Lines*, 293 N.L.R.B. 602 (1989); *Pet, Inc.*, 288 N.L.R.B. 1190 (1988)).

Unable to cite a *single case* in which a union's call for a consumer boycott was held to violate Section 8(b)(4) in the absence of picketing, George instead fabricates a legal doctrine to his suiting. George contends that *DeBartolo* did not really turn upon the absence of picketing, but instead upon the absence of effective, and thereby "coercive," speech. Pet. at 13. George reasons that the presence or absence of picketing cannot possibly be determinative under Section 8(b)(4) since in *Tree Fruits* the Court allowed a union to picket a secondary employer. Pet. at 8. Instead, George argues, the Court has focused exclusively on "the *degree* of collective economic coercion" inflicted by the union upon a secondary employer. Pet. at 7 (emphasis in original). Not surprisingly, George then contends that the Branch fails this purported test because the Branch's threatened letter-writing campaign was highly coercive. Pet. at 14-15.

Notwithstanding George's protestations, *DeBartolo* plainly hinged upon the fact that the union had refrained from picketing the mall. As the Fifth Circuit recognized, the Court drew a distinction between the union's conduct and picketing no fewer than ten times. App. at 20. George's professed inability to understand the "talismanic" difference between speech and picketing, Pet. at 8, is

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Fruits and *Safeco*, both of which involved picketing in support of a consumer boycott. *See* 485 U.S. at 577-80.

simply a refusal to admit that "picketing is a mixture of conduct and communication," *Tree Fruits*, 447 U.S. at 619, and that conduct, unlike pure speech, can be proscribed without violating the First Amendment.

Moreover, contrary to George's assertions, Pet. at 10, the Court in *DeBartolo* did not attempt to measure the degree of economic harm caused by the handbilling, and the decision did not turn upon a determination that the union was engaged in ineffective speech. The Court never suggested that the union's boycott of the mall was not effective or "coercive" as one would generally interpret that term. Indeed, the National Labor Relations Board had come to just that conclusion. *DeBartolo*, 485 U.S. at 573. The Court simply held that the boycott was not "coercive" *within the narrow meaning of Section 8(b)(4)*.[2] Indeed, when the Court expressly stated that "unions in their own meetings [could lawfully] urge their members not to shop in the mall," 485 U.S. at 583, it did so *without* imposing the condition now advanced by George—that unions can ask their members to participate in a consumer boycott but only if that boycott will not threaten the targeted company with economic ruination.

In addition to misreading *DeBartolo*, George also misinterprets *Safeco* and *Tree Fruits* when he concludes that picketing is irrelevant and that the "effectiveness" of a union's boycott is the determinative factor. Pet. at 8. Simply put, the fact that picketing is sometimes not *sufficient* to establish a violation of Section 8(b)(4), as George notes was the case in *Tree Fruits*, does not refute

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[2] Further evidence that the speech at issue in *DeBartolo* had been effective is the fact that the mall owner expended all the resources necessary to litigate its case to the Court. Such persistence would certainly have been unnecessary if, as George claims, the union's handbilling had been ineffective.

the clear case law that picketing or some other physical act is *necessary* for a consumer boycott to be unlawful.

That George has utterly misread *DeBartolo*, *Tree Fruits*, and *Safeco* is confirmed by the myriad of cases subsequently decided. Not one of these cases inquires into the effectiveness of the challenged speech; yet each of these cases recognizes that *DeBartolo* turned upon the absence of picketing. *See* App. 22-24 (citing cases).

Finally, George is mistaken when he contends that the Branch's conduct is not entitled to First Amendment protection because the Branch never publicized its dispute with the Postal Service (regarding George's inspection of the letter carrier routes) to anyone other than Phil Hampton of Brookfield. Pet. at 15. George has disingenuously ignored the fact that the Branch's "publicity" to Hampton concerned a proposed letter-writing campaign (never, in fact, initiated) to be directed at letter carriers within George's Brookfield sales territory. Such a campaign is clearly permissible under Section 8(b)(4). *See DeBartolo*, 485 U.S. at 583 ("unions in their own meetings [can] urge their members not to shop in the mall"). Indeed, as the District Court accurately observed, the Branch's proposed letter-writing campaign was closer to pure speech and involved "less an element of physical presence" than did the handbilling found permissible in *DeBartolo*. R. 843-44.

In sum, it should come as no surprise that George cannot point to a single case where a union's proposed letter-writing campaign was held to violate Section 8(b)(4). After all, it is simply preposterous to assert—as George essentially does—that the First Amendment allows union members to speak, but only if their speech will not have any effect. The Fifth Circuit thus was entirely correct when it held that George had failed to state a claim under Section 8(b)(4).

2. Contrary to George's assertion, the Fifth Circuit's refusal to interpret Section 8(b)(4) as a limit of speech is entirely consistent with the interpretation given Section 8(b)(4) by the courts of appeal for other circuits.

First, none of the cases cited by George involved a publicity-based appeal to consumers.[3] Thus none engaged in a balancing test which weighs a union's right to urge a consumer boycott against the degree of economic pressure exerted by that consumer boycott.

Second, the fact that other circuits have held that a union can violate Section 8(b)(4) through conduct other than picketing—such as through physically-obstructive

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[3] *See Pye* v. *Teamsters Local Union No. 122*, 61 F.3d 1013, 1021-23 (1st Cir. 1995) (union, in attempt to force liquor stores to stop doing business with beer manufacturer, had union members in groups of 50-100 shop at liquor stores and make inexpensive purchases with large denomination bills); *Local Union No. 25* v. *NLRB*, 831 F.2d 1149, 1153-55 (1st Cir. 1987) (union struck employer and filed frivolous grievances against employer in an attempt to force another employer to assign work to union); *Gottfried* v. *Sheet Metal Workers' Int'l Ass'n, Local Union No. 80*, 876 F.2d 1245, 1247 (6th Cir. 1989) (union terminated collective bargaining relationship and withdrew work force from employer in an attempt to force employer's corporate sister to recognize union as collective bargaining representative of its employees); *International Union of Operating Engineers, Local 150* v. *NLRB*, 47 F.3d 218, 222 (7th Cir. 1995) (union picketed gates exclusively used by employees of secondary employer during dispute with primary employer); *Sheet Metal Workers, Local Union No. 91* v. *NLRB*, 905 F.2d 417, 424 (D.C. Cir. 1990) (union conditioned wage concessions upon employer's adoption of collective bargaining agreement provision which violated Section 8(e)); *Limbach Co.* v. *Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1256 (3d Cir. 1991) (union repudiated collective bargaining agreement with employer in attempt to force employer to adopt contractual provision which violated Section 8(e)); *NLRB* v. *IBEW*, 405 F.2d 159, 161 (9th Cir. 1968) (union threatened to terminate collective bargaining agreement with employer unless employer enforced contractual provision which violated Section 8(e)).

shopping techniques[4] or the withholding of employees' services[5]—does not undermine the Fifth Circuit's conclusion that some sort of conduct beyond pure free speech is necessary to establish a Section 8(b)(4) violation. To the contrary, these cases demonstrate the correctness of the Fifth Circuit's decision.[6]

3. On appeal, George conceded that if the Branch's letter-writing campaign fell outside the scope of Section 8(b)(4), that campaign would also enjoy a defense under Texas law. App. 26. George made this concession rather than address the NALC's strong argument that Section 8(b)(4) preempted George's state law claim regardless of whether George had a viable claim under federal labor law.[7] App. 26, n.11.

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[4] *Pye*, 61 F.3d at 1021-23.

[5] *Gottfried*, 876 F.2d at 1247.

[6] George's contention that the Fifth Circuit's decision also conflicts with an earlier Fifth Circuit case is equally groundless. In *Brown & Root, Inc.* v. *Louisiana State AFL-CIO*, 10 F.3d 316 (5th Cir. 1994), the Fifth Circuit merely held that a union's refusal to lobby did not fall within the statute's meaning of "coercion." *Id.* at 323. *See also id.* at 326-27 (reviewing *DeBartolo*). In reaching this conclusion, the Fifth Circuit, in dicta, quoted from a pre-*DeBartolo* case, *Local Union No. 48 of Sheet Metal Workers International Ass'n* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964), which, in dicta, equated "coercion" with "economic retaliation." *See Brown & Root*, 10 F.3d at 320 (quoting *Hardy*, 332 F.2d at 686 (enforcing a contract, even though judicial enforcement is literally "coercive," since "Congress used 'coerce' [in Section 8(b)(4)] as a word of art")). That George points to this double-dicta quote as *Brown & Root's* holding, Pet. 13, merely betrays George's inability to interpret case law accurately.

[7] *See, e.g., United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 721, 730 (1966); *Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton*, 377 U.S. 252, 259 (1964); *BE&K Construction Co.* v. *United Brotherhood of Carpenters*, 90 F.3d 1318, 1328-30 (8th Cir. 1996), *Monarch Long Beach Corp.* v. *Soft Drink Workers, Local 812*, 762 F.2d 228, 232 (2d Cir. 1985).

While George may now regret his concession, he cannot fault the Fifth Circuit for not deciding an issue he already conceded. George similarly cannot base his Petition on "significant federalism concerns," Pet. at 18, when he already admitted to the Fifth Circuit that no such concerns exist.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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